ing agreement have been fully complied with, that is to say, until the house is completed and full payment made the respondent is not entitled to a conveyance of the land. Whether such a contention can successfully be maintained against the respondent is, of course, for the trial court to decide but for the purpose of this appeal it is only necessary to consider whether the contention is a valid and reasonable contention. I have no doubt that it is and in this context I respectfully disagree with the learned judge's finding that there is no triable issue which can fairly be determined.

Another question involved in this appeal is whether or not the two agreements are distinct and severable. The learned judge has held that they are. This question, in my opinion, is plainly a question of construction to enable the court to conclude whether or not the respondent is in a position to enforce the sale agreement alone. In holding that the two agreements are distinct and severable, the learned judge is in effect deciding on the merits of the respondent's case. This, as pointed out, by Lord James in *Jacobs* v. *Booth's Distillery Company, supra*, the court should not do at this stage of the proceedings. The question for consideration ought to have been whether having regard to the terms of the two agreements there is a reasonable ground for the appellants to contend that they are not distinct and severable. That is all that is to be considered for the purpose of Order 14A. In this case it is not in dispute that the appellants, as a land development company, have embarked upon a scheme to develop their land into a housing estate. The preamble to the sale agreement expressly states that the land is to be subdivided into several lots for building purposes. A customer wishing to own one of these lots is required to enter into an agreement in respect of the land and also into an agreement in respect of the house which the appellants undertook to build. Whether the customer can only enter into a sale agreement for the purchase of the land without at the same time entering into an agreement for the building of the house is not clear from the affidavits but the language of clause 1 of the sale agreement provides reasonable ground for the view that it is not the intention to sell only the land. The reason for the requirement that the customer should also enter into the building agreement might very well be that in embarking upon this scheme the appellants have taken into account the profits which they hope to make from each transaction. I am not here saying that such is the view to be taken of clause 1 for that is a conclusion to be arrived at by the trial court. I am only saying that there is a reasonable ground for such a view and in that context again there is a fair question of construction involved. This is to say whether or not the two agreements are distinct and severable is plainly a question of construction to be determined by the trial court having regard to the terms of the two agreements read together. On this question also I respectfully disagree with the learned judge's finding.

In the event, for the reasons already stated I am of the view that the appellants should be given unconditional leave to defend and this appeal should, therefore, be allowed with costs. The costs of the application in the court below shall be costs in the cause.

Appeal dismissed.

Solicitors: *Allen & Gledhill; Skrine & Co.*

KOH LAN ENG & ANOR. v. TEE CHOON YONG

[O.C.J. (Winslow J.) October 31, 1969]

[*Singapore — Suit No. 44 of 1969*]

Landlord and Tenant — Lease — Option to renew whether exercised — Breach of tenant's covenant not to assign, underlet, sublet or part with possession — Failure to obtain approval of authority for unauthorised buildings — Contributory failure by landlord not signing plans to be submitted for approval — Strange behaviour of defendant — Authorising brother to sign warrant to solicitor to act in defendant's name — Order of court of 1967 not taken out before previous judge's retirement — Costs — How affected.

The plaintiffs' claim was for possession of land and premises, of which the defendant was tenant under a lease dated February 2, 1963 as shown in a plan annexed to that lease, to be used as a sawmill, for a period of three years from August 1, 1962 at a monthly rent of $275 payable in advance. The defendant was also given an option to renew at intervals of three years, for a total period of not more than nine years in all, at the same rent. Possession was claimed on the ground that the lease expired on July 31, 1965 when the defendant failed to exercise his option to renew.

Further, it was claimed that, even if the option to renew had in fact been exercised, it became defeated by the defendant's breach of two covenants — (iv) and (ix) — contained in the lease. By covenant (iv) the defendant undertook not to assign, or underlet or part with the possession of the demised land and premises or any part thereof without the consent in writing of the landlords first had and obtained. By covenant (ix) the defendant undertook either to submit plans for the approval of the proper authorities regarding certain unauthorised buildings or sheds already erected on the said land or to demolish same if such approval was not granted.

Held: (1) the plaintiffs were entitled to possession of the said premises not only because of failure on the part of the defendant to adduce satisfactory evidence of the exercise of the option to renew in July 1965 but also because the defendant had been in breach of covenant (iv) though not of covenant (ix);

(2) the defendant was a complete ignoramus as to the affairs of the sawmill, Sing Ling Sawmill & Company, at all times since the commencement of the lease and he had left the conduct of the affairs of this sawmill entirely in the hands of his younger brother who was one of the registered partners of Sing Ling Sawmill & Company at the relevant time;

(3) although the defendant was described in the aforesaid lease as a person trading as Sing Ling Sawmill & Company, he was never trading as such when the company was first registered in October, 1962. The partners of this business then were the defendant's younger brother and two others;

(4) with regard to breach of covenant (iv), it was highly doubtful whether the defendant was ever in possession of the demised land because after signing the lease in February 1963 he faded out of the picture leaving his brother in charge. In fact he parted with possession even before going into it. He gave his brother possession right from the start. He was merely a nominal tenant. Furthermore, there was ample evidence to show that a number of other businesses were subsequently commenced and conducted on the land and it was clear that whoever had been in charge of the land had clearly assigned, underlet, sublet or parted with possession of various parts of the said land;

(5) with regard to covenant (ix), if there was any breach of this covenant by the defendant about submitting plans for approval of the authorities the first plaintiff contributed to the breach by failing in the first place to carry out her obligations under covenant (ii) of the landlords' covenants requiring co-operation on the part of the plaintiffs in signing plans at the request of the tenant for submission to the authorities for approval of the buildings and sheds aforesaid;

(6) damages of $55,000, claimed by the plaintiffs, was in view of the plaintiffs' failure to observe covenant (ii) aforesaid by refusing to sign plans submitted by the defendant or on his behalf, excessive and was reduced to $27,000;

(7) the plaintiffs were entitled to only two thirds of their taxed costs for reasons which appear in the judgment.

Cases referred to:-

(1) *Leavey* v. *Hirst* [1943] 2 All E.R. 581.

(2) *Hindly* v. *Rickarby* (1803) 170 E.R. 718.

CIVIL SUIT.

Lee Boon Siong for the plaintiffs.

Andrew Ee for the defendant.

Cur. Adv. Vult.

Winslow J.: This is a strange case involving a number of equally strange characters who seem to have conducted their business and other affairs on strange and erratic lines, as well as in an almost criminally defiant manner so far as the authorities responsible for the suitability and safety of premises used as a sawmill and allied enterprises are concerned. As if evidence relating to behaviour of this kind was not sufficient to cause some amazement, if not perplexity, to all concerned, the court was confronted, right from the commencement of the hearing of this case, with a long tussle between counsel for the plaintiffs and counsel for the defendant about an order made by Buttrose J. on 28th November, 1967 which has still not been taken out and the terms of which counsel on both sides were unable to settle before the learned judge left the Republic on retirement. The supplementary agreed bundle of documents contains correspondence between counsel relating to this matter.

One of the strangest features about the whole case is why this matter of settling the order was allowed to remain in abeyance for so long and until long after Buttrose J. left. A certified true copy of the judge's notes of argument reads as follows: —

"Lee Boon Siong for plaintiffs.

Andrew Ee for defendant.

Lee opens

Claim on breach of covenant, para. 3 of statement of claim abandoned by plaintiffs.

Hands up amended statement of claim.

Ee objects to amendment.

Leavey v. *Hirst*.(1)

An entirely new issue raised — a claim for possession.

Lee intimates he is prepared to abandon his claim for possession to avoid an adjournment.

Ee opposes amendment as set out in 1A of statement of claim but if granted will require adjournment to take instructions and plead to it.

Lee intimates that if adjournment granted he will not abandon his claim for possession.

— Adjourned to a date to be fixed by the Registrar.

Plaintiffs to pay defendant's costs of the day thrown away including getting-up fee.

Intld. M.B.
J.
28.11.67."

According to page 63 of the supplementary agreed bundle of documents, Messrs. P. T. Wong & Company on behalf of the defendant wrote a letter to the Registrar on 29th November, 1968 in the course of which they purport to quote the "minutes" of Buttrose J. as follows: —

"10.05 a.m. Lee abandon paragraph 3 of pleadings and submitted a copy of amended statement of claim.

Andrew Ee objects.

Court allowed amendment as to paragraph 1A of statement of claim on terms stated by Andrew Ee.

Adjourned to date to be fixed by the Registrar.

Plaintiffs to pay defendants' costs of the day thrown away.

10.30 a.m. Court adjourned."

They then go on to say that their Mr. Andrew Ee noticed the omission relating to the getting-up fee a few days later. The letter then goes on as follows: —

"He then inquired of Mr. Gan, the private secretary to the judge, as to what steps should be taken to bring the omission to the judge's attention. Should counsel write in to the Registrar, or directly to the private secretary? Mr. Gan replied that there was no need to write in yet, but that he would inquire of the judge. Our Andrew Ee then left without seeing the judge. On the same afternoon, Mr. Gan telephoned us to inform us that he had mentioned the omission to the judge who then directed him to record in the minutes the words, 'including getting-up fee'."

I have had an opportunity of looking at the learned judge's notes from which I am satisfied that the concluding words "including getting-up fee" are in his own handwriting.

If Mr. Andrew Ee (for the defendant) is correct in saying that the judge's private secretary, Mr. Gan, informed him that the judge had directed him to record in the minutes the words "including getting-up fee", this can only mean that the judge directed Mr. Gan to record those words in the minutes kept by him as private secretary.

Furthermore, it should be observed that the minutes of Buttrose J. quoted by Messrs. P. T. Wong & Company in their letter of 29th November, 1968 are not the minutes of Buttrose J. but the minutes kept by Mr. Gan as private secretary. I need hardly add that judges do not keep minutes.

I have looked at these minutes and I find that someone, presumably Mr. Gan, has added the words "including getting-up fee" in the penultimate line.

I have also taken the opportunity of examining the copy of the pleadings for the judge's use which was before Buttrose J. as well as the amendment of the statement of claim submitted to him on 28th November, 1967 which includes a new paragraph 1A as well as a new sub-paragraph 1(a) to paragraph 7 reading "Possession of the said premises" as being an additional claim made by the plaintiffs.

Buttrose J. noted in his own handwriting on the pleadings placed before him that paragraph 3 had been abandoned and with regard to paragraph 5, he struck out the words "has failed to take any steps to evict the said Lim Teng Khai".

With regard to the amended statement of claim itself, the new paragraph 1A underlined in red ink remains but sub-paragraph 1(a) of paragraph 7 relating to the plaintiffs' claim for possession of the said premises has been struck out, presumably by Buttrose J., judging by the kind of nib and ink used.

It will be seen from what I have set out so far that the amendment as to paragraph 1A was allowed but not the amendment as to sub-paragraph 1(a) of paragraph 7. It would also appear that Buttrose J. awarded the defendant costs of the day thrown away including getting-up fee. Counsel for the plaintiffs did not agree with the order for the getting-up fee and the order as a whole was never taken out.

As I have already said, when the case came on for hearing on 17th March this year before me, the case commenced with a long tussle between counsel as to the exact nature of the order made by Buttrose J. on 28th November, 1967. It was eventually agreed however that I should proceed on the basis of both amendments 1A and sub-paragraph 1(a) of paragraph 7 to the statement of claim. Counsel for the defendant submitted an amended defence and counter-claim in respect of the amended statement of claim. I allowed the amended defence but refused to allow the counter-claim and reserved the question of what costs should be allowed in respect of 28th November, 1967 until the end of the hearing which concluded on 18th July being the 7th day from its commencement.

A slight dispute arose before Mr. Lee Boon Siong, counsel for the plaintiffs, opened his case as to the authority given to counsel by the defendant to act for him (see AB52). This warrant to act was signed not by the defendant but by his brother, Tay Chin Ban. In the face of this objection by counsel for the plaintiffs, I called upon the defendant, Tee Choon Yong, to explain what had happened and he confirmed that because he was busy, he asked his brother to sign the warrant on his behalf using his, the defendant's name. What would otherwise have been a false document was thereby explained although the behaviour of the defendant and his brother in this respect can hardly be described as satisfactory — so much so that even Mr. Andrew Ee did not seem to know who exactly his client was, at one stage. The defendant also confirmed that he did not appear in court on 28th November, 1967 but that his brother did. It would be interesting to know what order Buttrose J. would have made with regard to costs thrown away and getting-up fee if he had been informed that the defendant was absent. I shall, however, endeavour to deal with this after making my findings on the case as a whole. All I should like to say, at this stage, is that counsel for the plaintiffs could well have allowed the order to be taken out, under protest, and appealed against it, which he did not.

Now, with regard to the plaintiffs' claim for possession, damages and costs, the first matter to be examined is the lease of 2nd February, 1963 concluded between the plaintiffs of the one part and Tee Choon Yong, the defendant, of the other, to have retrospective effect from 1st August, 1962. On that date, the firm had not yet been registered at all but it was subsequently registered as commencing business with effect from 1st October, 1962 of which the defendant should have been aware on 2nd February, 1963.

An obvious observation to be made is that, although the defendant, Tee Choon Yong, is described as a person trading as Sing Ling Sawmill & Company, the certificate of first registration of the business as a sawmill on 4th October, 1962 shows that the partners of the business as on that date were Mr. Tan Chock Kee, Teh Hwee Siong and Tay Hai Teng (also known as Tay Chin Ban). The defendant, so far as the Business Names Register is concerned, had nothing to do with the sawmill. But it is interesting to note that his brother, Tay Chin Ban, was one of the three registered partners. When the lease was signed by the plaintiffs and the defendant themselves on 2nd February, 1963 before Mr. Tan Peng Khoo, an advocate and solicitor of the firm of Messrs. Oehlers & Choa, no attempt appears to have been made by the said Tee Choon Yong who signed as tenant to inform anyone that he was not trading as Sing Ling Sawmill & Company. Apparently the brother was also present then.

The defendant, Tee Choon Yong, according to the lease, was to be the tenant of that land coloured yellow and black in the plan annexed to the lease to be used as a sawmill for a period of 3 years from 1st August, 1962 at a monthly rent of $275 payable in advance. He was also given an option to renew at an interval of 3 years each not exceeding 9 years at the same rent, which was obviously subject to his observance of the tenant's covenants contained in paragraph 3. In other words, the defendant, upon conforming with his covenants, could have opted to renew the lease from time to time for a maximum of 9 years in all from 1st August, 1962 at the same rent.

The plaintiffs now complain that when the lease expired on 31st July, 1965 the defendant did not exercise the option to renew and that he continued and still continues to occupy the premises wrongfully. Furthermore, complaint is made that any option to renew became defeated by the defendant's breach of two covenants *viz.*, covenants (iv) and (ix) of paragraph 3.

According to these covenants, the defendant undertook as follows: —

> "(iv) Not to assign or underlet or part with the possession of the demised land and premises or any part thereof without the consent in writing of the landlords first had and obtained; and
>
> (ix) Either to submit plans for the approval of the proper authorities regarding the said buildings or sheds now erected on the said portion of the land coloured black in the plan annexed hereto to the proper authorities for their approval or to demolish same if such approval is not granted."

The defendant denies breach of these two covenants and claims that he had orally notified the plaintiffs through his representatives on several occasions before 31st July, 1965 that he was exercising this option to renew the lease for a further 3 years.

It seems to me that the evidence is overwhelmingly in favour of the plaintiffs with regard to breach of covenant (iv) by the defendant. As a question of fact it seems highly doubtful whether he ever was in possession of the demised land and premises because, strangely enough, after signing the lease on 2nd February, 1963 he seems to have more or less faded out of the picture and left his brother, Tay Chin Ban, who now turns out to have been a partner of Sing Ling Sawmill & Company from October 1962, completely in charge of the said land and premises. There is little satisfactory evidence to show that he, the defendant, ever saw the plaintiffs again, apart from a visit to the first named plaintiff with the site plan Exhibit D1, or had any direct dealings with them with regard to the lease in his capacity as tenant. He left everything to his younger brother, Tay Chin Ban. He was more interested in his affairs relating to his coconut plantation in Batu Pahat. As he himself said, he was only concerned with signing the lease and the plan (Exhibit D1 which was prepared by Chung Swee Poey & Sons, Architects & Structural Engineers, for submission to the authorities for permission to use the land as a sawmill in July 1963). I shall deal with this later. He took no part whatsoever in the business of Sing Ling Sawmill & Company and entrusted everything to his brother. He was totally in the dark about others on the premises and said he knew nothing about sawmills.

Having made these dramatic admissions during his examination-in-chief on 19th March, 1969, he proceeded in his cross examination on 27th March, 1969 to claim that he took a slightly more active part in the affairs of this sawmill than he had previously admitted. He said he visited the place once a month, spending two or three hours there each time, ever since 1962. He claimed to have financed the business by putting up a capital of $28,000 for which he was unable to produce any receipt. He said he paid this sum to his younger brother. He admitted that he was not registered as a partner although he financed the business but no accounts had ever been submitted to him nor had he received any portion of the profits. After considerable prevarication he admitted that the premises are occupied by Shem Sheng Yew Kee Timber & Company, Ghee Huat Electric Sawmill, Sing Ling Refrigeration and Ho Wee Meng. It is clear from his evidence that he was a complete ignoramus about the affairs of Sing Ling Sawmill & Company and how they were conducted on the land and premises of which he was the tenant.

It seems incredible that a tenant such as he was should know so little about what took place on the land and premises of which he was the tenant except on the basis that he merely lent the colour of his name for the purposes of the lease in order to enable his younger brother, Tay Chin Ban, to run the business as he pleased and to deal with the tenancy in all respects as though he, Tay Chin Ban, were the actual tenant and not the defendant. If this did not amount to an outright assignment or parting with possession of the land and premises in favour of his younger brother and Sing Ling Sawmill & Company, I cannot imagine what else it can be said to have been.

One would have thought — and this applies also to the circumstances relating to the signing of the warrant to act by Tay Chin Ban in the defendant's name — that if the defendant had a genuine interest in maintaining his tenancy rights under the lease and to use the land and premises as a sawmill, there would be some more cogent evidence at least of his physical presence as an occupier of some kind in relation to the said land and premises. I do not believe what he said about visiting the premises even once a month. I am quite satisfied that what he said on 19th March, 1969 in examination-in-chief is the whole truth. He merely signed two documents and stayed completely out of possession. In short, he "parted" with possession even before going into it. He never took possession and gave his brother possession right from the start. As I have already said, he was a tenant only in name. I do not even believe that he ever financed Sing Ling Sawmill & Company to the extent of $28,000 or at all. What monies he may have advanced to his brother for whatever he wanted to do is irrelevant and completely without any substantiation whatsoever. He had no connection with Sing Ling Sawmill & Company himself at the time of the signing of the lease even if he might have had some connection in the past — before its registration as a business — but there was no evidence of this. The plaintiffs, at the time of the signing of the lease, undoubtedly considered him to be the sole-proprietor of the sawmill when he, himself, knew that he was not, in the legal sense, whatever he might have considered himself to be. Tay Chin Ban was present, according to the defendant, at the time and I am convinced that he, the defendant, never intended to be the tenant and that it was all along the intention on the part of the two brothers that those actually trading as Sing Ling Sawmill & Company (of which Tay Chin Ban was a registered partner) should, in fact, exercise all the tenancy rights conferred by the lease. Here again something very strange occurred and when I say "strange" I am perhaps being euphemistic so far as the defendant is concerned. He most probably concentrated on coconuts in Johore, without any care or thought for the Singapore premises to be used as a sawmill of which he was the tenant. He danced to his brother's tune and he was, to all intents and purposes, never a tenant.

The foregoing conclusions should suffice to dispose of this case in favour of the plaintiffs. In addition, however, there was ample evidence adduced on behalf of the plaintiffs to show that a number of other businesses were being conducted on the land and premises. The circumstances clearly show that whoever was in charge of the land and premises had clearly assigned, underlet, sublet or parted with possession of various parts of the land and premises. From the evidence of some of the witnesses who occupied the premises or parts thereof, it seems almost obvious that they were in such possession, despite some effort on the part of a few of them to minimise the extent and degree of their occupation rights by stating that they merely paid for water and electricity. This seems utter rubbish. It is significant, however, that one of them at least claimed that the premises now occupied by him are enclosed by four walls and that no one else other than himself

occupied the premises which he locked up at night. This was the sole-proprietor of Sing Ling Refrigeration, P.W.7. He added, with doubtful veracity, that it was a mere coincidence that his firm had the same name "Sing Ling" as the sawmill since had operated elsewhere under that name. He, at least, undoubtedly had exclusive possession of that part of the premises occupied by him for the purposes of his business.

It is also clear from Exhibits P7 and P8 that Ghee Huat Electric Sawmill, through Madam Gan Pek Choy, P.W.3, claimed in 1966 to have a lease or tenancy for 6 years in respect of part of the land and premises. These are claims which she made in her letters addressed to the Chief Fire Officer and the Chief Building Surveyor respectively with regard to the action the authorities threatened to take against the building occupied by her. There is even some mention of compensation money having been paid by her to the tune of a few thousand dollars. It is unlikely that she would have made a claim of such a nature if she were, as counsel for the defendant submitted, merely a licensee. Further, from Exhibit P16 it is also clear that a certain Mr. Hak Foo Tay claimed to be a sub-tenant of a portion of these premises.

On the authority of *Hindly* v. *Rickarby*,[2] if a person is found in premises and appears to be a tenant, this is *prima facie* evidence of an underletting sufficient to call upon the defendant to show in what character such person is in possession. Considering the evidence adduced on both sides as a whole, I find that the defence has not discharged the burden of showing the character of the possession of the various parts of the premises by the various firms or individuals occupying them even though some of these occupiers, who were called for the plaintiffs, seemed to be trying, understandably, to support the defendant's version of something less than an assignment, underletting or a parting of possession.

I now turn to a consideration of whether there is credible evidence to support the proposition that the defendant renewed the lease at the end of July 1965. The plaintiffs have satisfied me on their evidence that the defendant never opted to renew the lease for 3 years from 1965. I do not accept the evidence of D.W.3 and D.W.4 who claimed that they had accompanied Tay Chin Ban to the first plaintiff's house in Kallang Road some evening before the expiration of the lease in July 1965 in order to renew the lease. Their evidence was contradictory and most incredible. To give just one example, D.W.3 said that D.W.4 was the spokesman on that occasion and that he himself took no part in the discussion whereas D.W.3 said that it was D.W.4 who explained to the first plaintiff the reason for their visit. D.W.4 was an amazing witness who carried no conviction whatsoever. To give an example of his ineptitude as a witness, he said that the first plaintiff and her sons told them that they did not know them and that he thereupon turned round and left, although he knew that they knew him. A little later he said that what they said about not knowing him struck him as being very funny and that he laughed in their faces. According to him Tay Chin Ban also left quietly without saying anything.

On all the evidence, I have no hesitation in holding that the defendant never exercised his option to renew the lease in July 1965. I also find that the plaintiffs did not demand any increase of rent as a pre-condition to renewing the lease in 1965 for a further 3 years. The lease accordingly expired at the end of the first 3 years on 31st July, 1965 and no rent has since been paid. On 21st September, 1965 (at AB13), Messrs. Oehlers & Choa wrote to the defendant informing him that the lease had expired and that he should quit and vacate the premises and give vacant possession to the plaintiffs. The defendant was also informed, in effect, of his breaches of covenants (iv) and (ix).

In view of my finding that the defendant has been in breach of covenant (iv), and also my finding that the lease was never renewed after 31st July, 1965, it makes little difference whether the tenant was also in breach of covenant (ix) except to the extent that the conduct of both parties in relating to covenant (ix) as well as the conduct of the plaintiffs in relation to covenant (ii) of the landlords' covenants in paragraph 4 of the lease may have a bearing on the damages I should award as claimed by counsel for the plaintiffs in his final submissions.

According to the lease the former owners of Sing Ling Sawmill & Company had wrongfully erected certain buildings or sheds coloured black in the plan annexed to the lease and the defendant undertook in covenant (ix) either to submit plans to the proper authorities for approval of such buildings or sheds or to demolish the same if such approval was not granted. Covenant (ii) in paragraph 4 relating to the landlords requires co-operation on the part of the plaintiffs in signing such plans at the request of the tenant for submission to the authorities for approval of the buildings and sheds coloured black and of the use of the premises for the purposes of a sawmill.

Although the first plaintiff said in evidence that the defendant did not submit Exhibit D1 (the site plan) to her for her signature, she did admit that she was shown some plan by the defendant which she did not understand and that, on making inquiries from some people, she discovered that it was a plan for the purposes of subdividing the land and she refused to sign it. She admitted that the defendant had told her that it was a plan for the purposes of obtaining approval for putting up buildings. She claimed that she did not understand the procedure that the landlord's signature was required before such plans could be approved. But she was contradicted on this by the architect who gave evidence for the defendant.

It is clear from the evidence of D.W.2, a registered architect, that his firm drew up the site plan (Exhibit D1) as a first step towards regularising the existing buildings on the land. It is also clear from his evidence that the first plaintiff accompanied by her son, P.W.10, who was then a teenage boy, in 1963, came to see him in his office with the site plan (Exhibit D1) and that he informed her that unless she signed the plan, it could not be submitted for the consideration of the authorities. In answer to me, he made it clear that he did not tell the first plaintiff that Exhibit D1 was a sub-division plan although a sub-division plan could also

look like Exhibit D1. He also stated that he explained to her that Exhibit D1 was for the purpose of obtaining planning permission to regularise the unauthorised structures. On his evidence it seems to me quite clear that the first plaintiff has not been candid about Exhibit D1 and that, in the circumstances, she cannot be said to have carried out her obligations under covenant (ii) of paragraph 4. I accept the evidence of the architect, D.W.2, who clearly explained to her what she was required to do.

In the circumstances, if there was any breach by the defendant of covenant (ix) about submitting plans for approval of the authorities, the first plaintiff contributed to the breach by failing in the first place to carry out her obligations under covenant (ii) of paragraph 4 of the landlords' covenants.

It is perhaps unfortunate that the defendant did not seek legal advice earlier as to his obligations under covenant (ix) in the light of the first plaintiff's attitude if he genuinely intended to fulfil his obligations as a tenant in actual possession of the premises would have done. On the whole, however, I do not propose to regard him as having been in breach of covenant (ix) because of my finding that the first plaintiff refused to sign Exhibit D1 despite the architect's advice.

In view of my finding that the lease was never renewed and that covenant (iv) has been contravened by the defendant, it follows that judgment will have to be entered for the plaintiffs for recovery of possession of the premises in question with costs which, in the exercise of my discretion, I fix at two-thirds of the total taxed costs taking into consideration the facts relating to the adjournment of the hearing before Buttrose J. on 28th November, 1967 as well as the fact that the defendant has succeeded in refuting breach of covenant (ix).

As to damages of $55,790 claimed by the plaintiffs in their "damages submission", Exhibit D.S., I consider that that amount should be reduced by half at least in view of the conduct of the plaintiffs in refusing to sign the plan — Exhibit D1 and thereby failing to mitigate damages and also the fact that in a letter (AB68) dated 15th January, 1969 to Messrs. P. T. Wong & Company, the plaintiffs' solicitors offered to settle the matter on payment of arrears of rent and costs — which offer was unfortunately not accepted. Moreover *mesne* profits claimed have not taken into account an amount for water, light and electricity of which the defendant was entitled to claim deduction. I will therefore allow damages in the round sum of $27.000 which will include rent and *mesne* profits up to date.

Judgment will accordingly be for the plaintiffs as follows:—

1. Damages at $27,000.
2. Possession.
3. Two-thirds of their taxed costs.

Judgment for the plaintiffs.

Solicitors: *Drew & Napier; P. T. Wong & Co.*

LIM KEAN v. CHOO KOON

[O.C.J. (Yong J.) October 31, 1969]

[Kuala Lumpur — Civil Suit No. 561 of 1966]

Limitation — Date when cause of action accrues — Order of Rent Assessment Board fixing rent — Claim for recovery of excess of rent — Control of Rent Ordinance, 1956, s. 3(4) — Limitation Ordinance, 1953, s. 6(1)(d).

Landlord and Tenant — Rent — Claim for recovery of excess rent — Limitation — Control of Rent Ordinance, 1956, s. 3(4).

The plaintiff claimed for recovery of excess rent paid to his landlord. An application had been made to the Rent Assessment Board and an order was made by the board on February 15, 1966 fixing the maximum recoverable rent at $50. The plaintiff claimed the excess paid from November 15, 1957 to January 31, 1966. The defendant contended that the claim was barred by limitation.

Held: the period of limitation in this case commenced to run from the date of the order of the Rent Assessment Board which was the date when the cause of action accrued.

Cases referred to:-

(1) *Cooke* v. *Gill* (1873) L.R. 8 C.P. 107, 116.

(2) *Read* v. *Brown* (1888), 22 Q.B.D. 128, 131.

(3) *Barton* v. *North Staffordshire Railway Co.* (1888) 38 Ch. D. 458.

(4) *Welch* v. *Bank of England & Ors.* [1955] Ch. 508, 544,

(5) *West* v. *Gwynne* [1911] 2 Ch. 1, 15.

(6) *Re Snowdon Colliery Co. Ltd.* (1925), 94 L.J. Ch. 305, 308.

(7) *Lauri* v. *Renad* [1892] 3 Ch. 402, 421.

(8) *Re Welsh Anthracite & Collieries Ltd.* [1950] Ch. 18, 22.

(9) *Re Athlumney* [1898] 2 Q.B. 547, 551, 552.

CIVIL SUIT.

Eugene Lye for the plaintiff.

K. K. Lam for the defendant.

Cur. Adv. Vult.

Yong J.: The plaintiff a tenant sues the defendent, his landlord for the recovery of the sum of $8,833 being the accumulated excess payments of rent from 15th November 1957 to 31st January 1966.

When the monthly rental was increased from $130 to $143, the plaintiff applied to the Rent Assessment Board to fix the "maximum recoverable rent" payable by him in respect of the premises. On February 15, 1966 the board made an order fixing the monthly rental at $50. On May 18, 1966 the plaintiff filed his claim in court. At the trial neither party called any evidence.

The plaintiff's claim is based on section 3(4) of the then relevant Control of Rent Ordinance, 1956, which reads:—

"A tenant who has paid his landlord a sum in excess of the rent which may lawfully be received under the provisions of this section may recover such sum from the landlord."

The defence admitted that $8,833 was overpaid but contended that the plaintiff's claim was barred by the Limitation Ordinance 1953, section 6(1)(d) of which provides:—